89-1945

Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

LAURINE BROWN (LaMAR),
Petitioner,

v.

FOX VALLEY & VICINITY CONSTRUCTION WORKERS PENSION FUND, DESSIE BROWN, AND ALL UNKNOWN CLAIMANTS.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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June 7, 1990

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QUESTIONS PRESENTED

1. Whether this Court should reverse the clearly erroneous holding of the Seventh Circuit Court of Appeals giving effect to a waiver of pension benefits contained in a domestic relations order in contravention of the anti-alienation and preemption provisions of the Employee Retirement Income Security Act ("ERISA").

2. Whether this Court should allow the implementation of judicial legislation by the Seventh Circuit Court of Appeals providing for the imposition of a fiduciary duty not previously provided for in ERISA to "investigate" a pension plan's participant's marital status prior to distribution of pension benefits.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (*en banc*) is reported at 897 F.2d 275 and is reproduced in the Appendix (App.) at A-1 to A-20. The original opinion of the United States Court of Appeals for the Seventh Circuit is reported at 879 F.2d 249 and is reproduced in the Appendix at A-24 to A-37. The unpublished memorandum opinion of the United States District Court for the Northern District of Illinois is reproduced in the Appendix at A-40 to A-42. The initial opinion of the United States District Court for the Northern District of Illinois is reported at 684 F. Supp. 185 and is reproduced in the Appendix at A-43 to A-54.

JURISDICTION

The district court's jurisdiction was invoked under 28 U.S.C. § 1132(e) (1988). The jurisdiction of the court of appeals was invoked under 28 U.S.C. § 1291 (1988). The judgment of the court of appeals affirming the district court was entered on June 29, 1989, and its order vacating the opinion and granting a rehearing en banc was entered on November 6, 1989. The judgment of the court of appeals (en banc) affirming the district court was entered on March 9, 1990. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTES INVOLVED

ERISA § 206(d), 29 U.S.C. § 1056(d) provides as follows:

Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

* * *

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

(B) For purposes of this paragraph -

(i) the term "qualified domestic relations order" means a domestic relations order -

(I) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(II) with respect to which the requirements of subparagraphs (C) and (D) are met, and

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which -

(I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies -

(i) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.

(iii) the number of payments or period to which such order applies, and

(iv) each plan to which such order applies.

ERISA § 404(a), 29 U.S.C. § 1104(a) outlining the duties of a fiduciary of a benefit plan provides as follows:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

ERISA § 514, 29 U.S.C. § 1144 dealing with preemption provides as follows:

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

(b) Construction and application

* * *

(7) Subsection (a) shall not apply to qualified domestic relations orders (within the meaning of section 1056(d)(3)(B)(i) of this title).

STATEMENT OF THE CASE

James Brown, a participant in the Fox Valley & Vicinity Construction Workers Pension Plan (Plan), married Laurine Brown and, pursuant to Section 6.4 of the Plan, designated her as his beneficiary.

Section 6.4 of the Plan provides, in pertinent part, as follows:

> "The Participant's Beneficiary shall be the person or persons he so designates in the last written notice received in the Administrative Office prior to the Participant's death. It shall be the responsibility of the Participant to notify in writing the Administrative Office of his choice of Beneficiary or any change in Beneficiary . . ."

Section 6.4 further enumerates a list of contingent beneficiaries, in descending order of priority, in case the participant either fails to name a beneficiary or the beneficiary is not living at the time of the participant's death. When James and Laurine were later divorced, as part of their marital property settlement agreement, each agreed to waive any interest in the other's pension plan. However, James did not change his Plan beneficiary following his divorce.

After James' death, the Plan brought an interpleader action seeking a determination of the proper beneficiary to receive the death benefits.[1]

The District Court gave effect to the divorce decree which had incorporated the marital property settlement "waiver" provision. The court created a federal common law rule adopting Illinois law governing the rights of a former spouse to recover life insurance proceeds. 684 F. Supp. 185, 190 (N.D. Ill. 1988), *aff'd*, 879 F.2d 249 (7th Cir. 1989), *aff'd on rehearing en banc*, 897 F.2d 275 (7th Cir. 1990), App. at A-52 to A-53. In Illinois, a divorce decree must include a specific termination of a beneficiary's interest in life insurance proceeds before a designated beneficiary's rights will be affected, unless the policy itself or a statute provides otherwise. The district court therefore ruled that "a marital property settlement will affect the beneficiary designation for a [death benefit] under an ERISA plan when the settlement contains specific terms regarding pension benefits." 684 F. Supp. at 190, App. at A-53. In denying Laurine's motion for summary judgment and, instead, entering summary judgment in favor of Dessie Brown, the contingent beneficiary under the Plan, the district court construed the language contained in the divorce decree as a specific waiver of pension benefits, and found "no statute or clause in the plan govern[ed] the effect of [the] divorce decree upon plan benefits." *Id.* at 188, App. at A-48 to A-49.

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[1]The parties stipulated that the divorce decree was not a "qualified domestic relations order." (QDRO) ERISA § 206(d)(B)(i)(I-II), 29 U.S.C. § 1056(d)(B)(i)(I-II) (1988).

In the Seventh Circuit Court of Appeals' original opinion, vacated November 6, 1989, and again following a rehearing *en banc,* in an 8-4 split decision the Court recognized that a non-participant could waive her rights to pension benefits, and upheld the district court's creation of new federal common law giving effect to the divorce decree waiver provision. 879 F.2d at 253-254, 897 F.2d at 280-281, App. at A-32 and A-11. In rejecting arguments that the payment of death benefits to someone other than the designated beneficiary would result in an impermissible alienation of benefits, the Seventh Circuit found that the ERISA anti-alienation provision did not apply to a proper waiver of interest by a non-participant in a plan. 897 F.2d at 279, App. at A-7. The Court reasoned that the waiver was not preempted by ERISA's anti-alienation provision because an alienation could occur only when benefits were shared between spouses, and not when such benefits were waived. *Id.,* App. at A-7. The Seventh Circuit concluded that the settlement waiver is effective "when it becomes known to the Fund before payment." 897 F.2d at 282, App. at A-12. The court also recognized, without citation to authority, a fiduciary's duty to "investigate" the marital status of a participant prior to the distribution of death benefits, and rejected an argument that such a duty would be burdensome. *Id.,* App. at A-11 to A-12.

Dissenting from the majority's decision, Judge Easterbrook, with whom Chief Judge Bauer and Judge Manion joined, found that the Court misapplied ERISA's anti-alienation provision by unduly restricting its scope to participants only. 897 F.2d at 283, App. at A-15. Judge Easterbrook stated that the majority's decision requires the Fund to disregard the written designation rule. *Id.,*

App. at A-14. Noting that ERISA is full of unyielding rules designed to simplify administration, Judge Easterbrook opined that Congress has in fact decided to have rules to govern the operation of pension plans rather than more flexible standards, with attendant high costs of administration and erratic application, 897 F.2d at 284, App. at A-15.

In a separate dissent, Judge Ripple, with whom Chief Judge Bauer and Judges Easterbrook and Manion joined, suggested that the majority's decision undermines the will of Congress and significantly impedes the Congressional goal of efficient and certain administration of employee benefit plans. *Id.*, App. at A-16. Judge Ripple found that 29 U.S.C. § 1104(a)(1)(D) (1988) requiring that a plan fiduciary administer a plan in accordance with its documents and instruments embodies a strong federal policy that all parties -- participant, trustee, and beneficiary -- be able to ascertain their rights and liabilities with certainty. *Id.*, App. at A-16. Judge Ripple concluded that James Brown was entitled to rely upon the terms of the Plan in designating his beneficiary, and in retaining the same beneficiary following his divorce, notwithstanding the divorce decree's "waiver" provision. Accordingly, the "waiver" should not be given effect because a change in the designation of beneficiary was never made by James Brown, the Plan participant. 897 F.2d at 285, App. at A-19.

REASONS FOR GRANTING THE WRIT

I. Unless Reversed The Seventh Circuit's Decision Will Seriously Hinder Congress' Statutory Scheme Aimed At Achieving Uniformity And Predictability In The Administration Of Employee Benefit Plans

Congressional enactment of the Employee Retirement Income Security Act (ERISA) of 1974 was intended to implement a comprehensive regulatory scheme for the federal oversight of private employee benefit plans. ERISA § 2(b), 29 U.S.C. § 1001(b) (1988). Congress expressed the view that achievement of ERISA's goals would be obtained through the establishment of uniform and predictable fiduciary standards for the administration of plans. Introductory Statement of Senator Bentsen on S. 1179, *reprinted in* Subcomm. on Labor, Senate Comm. on Labor and Public Welfare, 1 Legislative History of the Employee Retirement Income Security Act of 1974, at 210 (1976) ("Legislative History"); Introductory Statement of Senator Javits on S. 1557, *reprinted in* 1 Legislative History at 275. Consequently, Congress created an elaborate regulatory scheme governing the management of plans and the distribution of benefits. ERISA § 2(b), 29 U.S.C. § 1001(b) (1988).

The lower court's decision runs contrary to the implementation of Congress' intent, and if allowed to stand, will seriously undermine ERISA's statutory framework. Specifically, the decision will adversely affect the distribution of death benefits to millions of pension plan beneficiaries. *See* U.S. Dept. of Labor, Labor Management Services Admin., Pension and Welfare

Benefits Programs, Estimates of Participant and Financial Characteristics of Private Pension Plans at 1 (1983) (fifty million American employees participate in more than 500,000 private pension plans).

The rationale used by the Seventh Circuit to arrive at its erroneous decision regarding the inapplicability of the preemption and anti-alienation provisions of ERISA to marital property settlements pursuant to a divorce decree, is in direct conflict with this Court's well established principles of ERISA statutory construction. Review by this Court is necessary to restore the integrity of ERISA's statutory framework and to give effect to Congress' intent regarding the need for uniform standards for the administration of pension plans.

A. The Lower Court's Ruling Undermines Congress' Intent To Subject State Domestic Relations Law To The Preemption And Anti-Alienation Provisions Of ERISA

Review of the Seventh Circuit's decision is needed to clarify the applicability of ERISA's preemption and anti-alienation provisions in the critical area of marital property settlements. Congress adopted the view that ERISA's goal of achieving a comprehensive regulatory framework for the administration of benefit plans would be accomplished through the preemption of "any and all state laws insofar as they may now or hereafter relate to" employee benefit plans. ERISA § 514(a), 29 U.S.C. § 1144(a) (1988). The preemption provision was intended to achieve uniformity in all aspects of plan administration. S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973); *reprinted in* 1 Legislative History at 621; H.R.

Rep. No. 533, 93d Cong., 1st Sess. 12 (1973), *reprinted in* 2 Legislative History at 2359. Thus, Congress would eliminate "the threat of conflicting and inconsistent state and local regulation," 120 Cong. Rec. 29,197 (1974) *reprinted in* 3 Legislative History at 4670 (Statement of Representative Dent). Additionally, in furtherance of ERISA's primary purpose of providing protection of individual pension rights, H.R. Rep. No. 533, 93d Cong., 1st Sess., 1 (1973), *reprinted in* 2 Legislative History at 2348, Congress enacted section 206(d)(1) of ERISA which provides that benefits under the plan "may not be assigned or alienated." 29 U.S.C. § 1056(d)(1) (1988).

Since the passage of ERISA in 1974, Congress has added only one exception to ERISA's preemption and anti-alienation provisions. As part of the Retirement Equity Act (REA) of 1984, Pub. L. 98-397, 98 Stat. 1426, Congress created a circumscribed exception for "qualified domestic relations orders" (QDRO), REA §§ 104(a),104(b), 29 U.S.C. §§ 1056(d)(3), 1144(b)(7) (1988). This amendment was enacted to limit the scope of a judicially created implied exception to the preemption and anti-alienation provisions allowing enforcement of spousal and child support garnishment orders. S. Rep. No. 575, 98th Cong., 2d Sess., 18-19 (1984) *reprinted in* 1984 U.S. Code Cong. & Admin. News at 2565. By amending ERISA with regard to support obligations, Congress' intention was to clarify when ERISA's preemption and anti-alienation provisions do and do not apply to family support obligations. Congress wished to provide "rational rules for plan administrators" by establishing "guidelines for determining whether the exception to the [anti-alienation] rules applies." S. Rep. No. 575, 98th Cong., 2d Sess., 18-19, *reprinted in* 1984

U.S. Code Cong. & Admin. News at 2565. In "carving out an appropriate and well-defined exception for domestic relations orders meeting specific standards", 130 Cong. Rec. 23,481 (1984) (remarks of Rep. Erlenborn), Congress reasserted its intent to make no other changes in the anti-alienation or preemption provisions of ERISA. *Id.; See also* H.R. Rep. No. 655, 98th Cong., 2d Sess. Pt. 1, at 39, 42 (1984).

The Seventh Circuit's decision which creates a judicial exception to ERISA's preemption and anti-alienation provisions by giving effect to a waiver of benefits contained in a non-QDRO marital property settlement frustrates the Congressional objective of limiting the scope of the federal recognition of state domestic relations law in the administration of pension plans. This decision is based on an approach that is inconsistent with that mandated by this Court. Specifically, this Court has provided the framework lower courts must utilize to implement Congressional intent with respect to the applicability of the preemption provision. In determining whether a state law is preempted by ERISA, "'the purpose of Congress is the ultimate touchstone,'" *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1, 8 (1987) (*quoting Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 747 (1985)). In order to effectuate Congressional intent, the language "relates to" should be given "its broad common-sense meaning" so that a "state law 'relates to a benefit plan, if it has a connection with or reference to such a plan.'" *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 47 (1987) (*quoting Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. at 739). This expansive interpretation of the parameters of ERISA's preemption provision reflects this Court's

concern for implementing Congress' objective of achieving uniformity and efficiency in the administration of pension plans. *Fort Halifax*, 482 U.S. at 9. Furthermore, the instant case presents a departure from the Seventh Circuit's own preemption analytical framework espoused in *MacLean v. Ford Motor Co.*, 831 F.2d 723 (7th Cir. 1987), where the court held that ERISA preempted state testamentary transfer law. *Id.* at 727. The *MacLean* court based its decision on the fact that state testamentary law giving effect to a will designating the beneficiaries of a Savings and Stock Investment Plan contrary to the provisions of the plan, not only "related to" the plan, but "[interfered] with the administration of the plan and violate[d] its terms." *Id.* at 728. In deciding that ERISA preempted state testamentary law, the Seventh Circuit "furthe[red] the Congressional goal of avoiding '[a] patchwork of regulation.'" *Id. (citing Fort Halifax*, 482 U.S. 1, 11). This is precisely what the instant decision fails to accomplish.

The lower court's decision is also contrary to ERISA's anti-alienation provision. A plain meaning interpretation of ERISA § 206(d) indicates that payment of benefits to anyone other than the participant or a properly designated beneficiary constitutes alienation. Thus, even if the marital property settlement is not preempted, enforcement of the settlement would still appear to conflict with the anti-alienation provisions of ERISA. In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), this Court has articulated a test to determine whether there is a conflict between a federal statute and a state law such as to invalidate the state law, consistent with the Supremacy Clause of the United States Constitution. 435 U.S. at 158. Under the test a conflict

will be found where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Therefore, this test mandates an inquiry into the purposes and objectives of Congress with respect to anti-alienation.

Congress made clear its intent with respect to alienability of plan benefits pursuant to a divorce decree when it provided the limited QDRO exception. ERISA § 206(d)(3)(A), 29 U.S.C. § 1056(d)(3)(A) (1988). This statutory provision unequivocally establishes that a distribution of pension benefits pursuant to a "domestic relations order" which is not a QDRO constitutes alienation. A "domestic relations order" is "any order . . . which relates to the provision of . . . marital property rights to a spouse . . . of a participant and is made pursuant to a State domestic relations law." ERISA § 206(d)(B)(ii)(I-II), 29 U.S.C. § 1056(d)(B)(ii)(I-II) (1988).

Review of the Seventh Circuit's decision is thus necessary to insure that state domestic relations law does not constitute an obstacle to the implementation of Congress' objectives regarding the provision of rational rules for plan administration.

B. The Lower Court's Fashioning Of Federal Common Law For The Distribution Of Pension Benefits Is Inconsistent With Congressional Policies Underlying ERISA

If left uncorrected, the Seventh Circuit's decision creating federal common law to govern ERISA, based on

the adoption of state life insurance law in effect eviscerates ERISA's statutory scheme for distribution of pension benefits. The lower court's fashioning of federal common law to decide the identity of the proper death benefit recipient is inappropriate inasmuch as the ERISA statutory scheme itself provides adequate means for resolving this issue. The rationale used by the Seventh Circuit in the instant case is in conflict with the same circuit's reasoning in *Cummings by Techmeier v. Briggs & Stratton*, 797 F.2d 383 (7th Cir. 1986). The *Cummings* court stated that while it may be appropriate for federal courts to develop federal common law to supplement the ERISA statutory framework, "where Congress has established an extensive regulatory network and expressly announced its intention to occupy the field, federal courts should not create additional rights under the rubric of federal common law." 797 F.2d at 390. In enacting sections 206(d)(3) and 514(b)(7) of ERISA, Congress has established a comprehensive statutory scheme governing the distribution of benefits pursuant to a marital property settlement and therefore the creation of federal common law would be inappropriate and unnecessary. *See Nachwalter v. Christie*, 805 F. 2d 956 (11th Cir. 1986).

The creation of federal common law governing ERISA by the lower court is based on a misunderstanding of the proper state law applicable to the instant case. The state law that is appropriate to be adopted by a federal court must be "consistent with the policies" underlying ERISA. *Id.* at 960. The state law of life insurance, as applied to the instant facts is inconsistent with the ERISA statutory structure. Within the ERISA scheme, life insurance benefits are governed by the provisions applicable to "welfare plans." ERISA §

3(l), 29 U.S.C. § 1002(l) (1988). The Seventh Circuit's decision deals with pension plans, ERISA § 3(2)(A), 29 U.S.C. § 1002(2)(A)(1988), which are governed by provisions different than those applicable to welfare plans. This Court has stated that while Congress has specifically provided in section 206(d)(1) that pension benefits may not be alienated or assigned, it had not enacted a comparable provision for welfare benefit plans. *Mackey v. Lanier Collections Agency & Service,* 486 U.S. 825, 837 (1988).

The net effect of the application by the Seventh Circuit of the state law governing a waiver of life insurance benefits pursuant to divorce, to a waiver of pension benefits is the creation of an impermissible equitable exception to the ERISA anti-alienation provisions governing pension plans. *Guidry v. Sheet Metal Workers National Pension Fund,* ___ U.S. ___, 110 S.Ct. 680, 687 (1990).

II. Review Of The Seventh Circuit's Decision Is Necessary To Determine the Validity Of A Judicially Created Duty Of An ERISA Fiduciary To "Investigate" The Marital Status Of Individual Pension Plan Participants Prior To The Distribution Of Death Benefits

The Seventh Circuit peremptorily created a new fiduciary duty for pension plan administrators to "investigate" the marital status of participants prior to distribution of death benefits. 897 F. 2d at 282, App. at A-11. This duty which is nowhere found in the ERISA statute, is inconsistent with the statutory framework and with the construction given to fiduciary duties by this

Court and other federal circuit courts. Under ERISA section 404(a)(1)(D) plan fiduciaries are required to act solely "in accordance with the documents and instruments governing the plan." 29 U.S.C. § 1104 (a)(1)(D). This section read in conjunction with section 402 requiring that employee benefit plans be put in writing, 29 U.S.C. § 1102 (1988), evinces Congress' intent to provide uniform and unambiguous standards for the administration of plans. H.R. Rep. No. 533, 93d Cong., 1st Sess., 12-13 (1973) *reprinted in* 2 Legislative History at 2359-2360. Thus, the lower court's decision will seriously undermine ERISA's statutory scheme designed to achieve ease in the administration of plans.[2]

This Court in *Central States, Southeast and Southwest Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) suggested that ERISA did not mandate the type of investigatory duty formulated here by the lower court. 472 U.S. 559, 581. Additionally, in a clear conflict with the instant decision, the Seventh Circuit in *Cummings*, 797 F.2d at 383, stated that ERISA imposes on fiduciaries only a duty to act in accordance with the terms of the plan and as such there is no duty of "individualized attention to the participants." 797 F.2d at 387 (citation omitted). Therefore, under ERISA section 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), as interpreted by the *Cummings* court, the fiduciary in the instant case had only the duty of distributing the death benefits consistent with the last "designated beneficiary" form on

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[2]The judicially created fiduciary duty to "investigate" is also inconsistent with the ERISA mandate that QDRO's be brought to the attention of plan administrators. ERISA § 206(d)(G)(i), 29 U.S.C. § 1056(d)(G)(i) (1988).

file with the plan, rather than give effect to the waiver contained in a collateral document. *See Nachwalter,* 805 F.2d at 960.

Compliance by plan fiduciaries with the Seventh Circuit's judicially created duty to investigate would "impose an almost impossible burden on ERISA plan administrators to seek out and maintain" information regarding each participant's marital status. *Cummings*, 797 F.2d at 387. Such a consequence undermines ERISA's statutory framework designed to achieve efficient and streamlined plan administration. The ERISA provisions with respect to fiduciary duties reflect a "considered congressional policy choice" to create standards by which a participant can measure a fiduciary's conduct, S. Rep. 127, 93d Cong., 1st Sess., 29 (1973), *reprinted in* 1 Legislative History at 615. "If exceptions to this policy are to be made, it is for Congress to undertake this task." *Guidry,* ___ U.S. ___, 110 S.Ct. at 687. This Court has repeatedly expressed disapproval regarding the creation of judicial legislation by courts of review: "It is our function to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great Northwestern Railway Co.,* 343 U.S. 562, 575 (1952); *See Sony Corp. of America v. Universal City Studios, Inc.,* 464 U.S. 417, 456 (1984). Review by this Court is essential to restore the integrity of the ERISA statutory framework.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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June 7, 1990

APPENDIX

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2322

FOX VALLEY & VICINITY CONSTRUCTION WORKERS PENSION FUND,

Plaintiff-Appellee,

v.

LAURINE BROWN (LAMAR),

Defendant-Appellant,

and

DESSIE BROWN,

Defendant-Appellee,

and

ALL UNKNOWN CLAIMANTS,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 8095—John F. Grady, *Chief Judge.*

ARGUED JANUARY 18, 1989—
REARGUED EN BANC DECEMBER 6, 1989—
DECIDED MARCH 9, 1990

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, KANNE, *Circuit Judges*, and ESCHBACH, *Senior Circuit Judge*.

WOOD, JR., *Circuit Judge*. This is an interpleader action filed by the Fox Valley & Vicinity Construction Workers Pension Fund ("Fund") to determine the proper recipient of a death benefit payable because of the death of Fund participant James Brown ("James"). The defendants in the action are Laurine Brown ("Laurine"), James's former spouse, and Dessie Brown ("Dessie"), James's mother. The district court denied Laurine's motion for summary judgment and entered summary judgment against Laurine and in favor of Dessie, ordering the Fund to pay the death benefit to Dessie. Laurine appeals this decision.

The Fund brought this interpleader action under 28 U.S.C. § 1335. The district court had jurisdiction pursuant to 29 U.S.C. § 1132(e). This case raises issues under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1101-1461. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

I. FACTUAL BACKGROUND

Laurine and James were married on April 14, 1982. James was covered by the Fox Valley & Vicinity Construction Workers Pension Plan ("Plan"), which provided for a Lump Sum Death Benefit ("Death Benefit") payable to the plan participant's designated beneficiary if the participant died before reaching retirement age. The Plan specifies how a participant may designate a beneficiary:

> The Participant's Beneficiary shall be the person or persons he so designates in the last written notice received in the Administrative Office prior to the Participant's death. It shall be the responsibility of the Participant to notify in writing the Administrative Office of his choice of Beneficiary or any change in Beneficiary. A Participant may, without the consent of his then designated Beneficiary, or Beneficiaries,

> change his Beneficiaries. In the event that the [P]articipant shall fail to name a Beneficiary, or if such Beneficiary shall not be living at the time of the Participant's death, such benefits shall be paid to:
>
> (a) his legal spouse, if living;
>
> (b) if no spouse be living, then to his living children in equal shares;
>
> (c) if no spouse or children be living, then to his parents in equal shares, or the survivor of such parents if only one (1) be living;
>
> (d) if no spouse, children, or parents be living, then to his living brothers and sisters in equal shares;
>
> (e) if no spouse, children, parents, or brothers and sisters be living, then to the estate of such deceased Participant.

In 1986, James executed a Beneficiary Designation Form naming Laurine as his beneficiary. On September 29, 1986, Laurine and James were divorced. They both agreed to a court-approved property settlement that included the following proviso:

> The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party.

Even after their divorce, James continued to live with Laurine for much of 1986 and 1987. James made no effort to change his designated beneficiary after the divorce. James died on June 17, 1987.

This dispute arose when Laurine attempted to have the Death Benefit paid to her. The Fund refused, claiming that it was uncertain who should receive the Death Benefit. The Fund then filed this interpleader action, asserting that although Laurine was the designated beneficiary, it was uncertain as to the legal effect of the marital property settlement agreement in which Laurine seemingly

waived her right to any benefits from the Fund. The Fund also named Dessie as a defendant since, under the Plan, Dessie would receive the benefit if the court determined that Laurine properly waived her claim.

Laurine moved for summary judgment on October 21, 1987, arguing that James, who was unrepresented at their divorce hearing, never read or understood the terms of the marital property settlement, which had been prepared by her lawyer. Laurine also asserted that even after the divorce, James intended for her to receive benefits from the Fund. The district court denied Laurine's motion for summary judgment. The court then entered summary judgment against Laurine and in favor of Dessie, finding that Laurine had waived her right to the Death Benefit. In this appeal, Laurine finds fault with the district court's use of the marital property settlement agreement. Laurine claims the court erred when it allowed the marital property settlement to affect Laurine's right under the Plan.

II. DISCUSSION

Summary judgment should be granted only when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 50(c). There were no disputed facts in this case and the district court found that, as a matter of law, the death benefit should be paid to Dessie.[1] We review that

[1] It was suggested that there were unresolved material facts that prevented summary judgment. These unresolved facts concerned the consideration for the agreement and the background leading up to its signing. On its face the agreement states that the parties each considered it to be in their best interests to settle between them all rights of every kind, nature, and description which either of them had or might hereafter have or claim against the other. It was stated that the consideration was the mutual and several promises and understandings set forth in the agreement regarding property interests, and for other good and valuable considerations. We see no need to try to go behind the mutual agreement of the parties.

decision de novo. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 354 (7th Cir. 1988).

As the district court noted, this is a case of first impression under ERISA. We must determine whether a divorced spouse who was designated as a beneficiary prior to the divorce will still receive the Death Benefit despite a provision in the divorce settlement waiving any rights to the benefit. Because ERISA preempts state pension benefit laws, 29 U.S.C. § 1144(a), we must find the answer to this issue within ERISA itself or in the federal common law interpreting ERISA. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (state law relating to employee benefit plans preempted); *Mutual Life Ins. Co. of New York v. Yampol*, 840 F.2d 421, 425 (7th Cir. 1988) (uniform remedies are fundamental to ERISA). In this case, our attention is focused on ERISA's anti-alienation provisions. 29 U.S.C. § 1056(d)(1), (d)(3)(A).

ERISA provides that a pension plan must prohibit the alienation or assignment of benefits. 29 U.S.C. § 1056(d)(1). These "spendthrift" provisions are designed to prevent unwise alienation or assignment. *AT&T v. Merry*, 592 F.2d 118, 124 (2d Cir. 1979). ERISA was amended in 1984 to clarify the effect of these spendthrift provisions on family support obligations such as alimony, child support, and separate maintenance. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1433 (1984); *see* S. REP. No. 575, 98th Cong., 2d Sess. 18-19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2547, 2564-65. Prior to the enactment of these amendments, some courts tentatively exempted state domestic relations orders from the ERISA anti-alienation provisions. *See, e.g., Operating Engineers' Local # 428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196, 200 (9th Cir. 1981) (order assigning benefits for alimony not in conflict with ERISA); *AT&T v. Merry*, 592 F.2d at 124-25 (ERISA provisions do not alter traditional support obligations); *Cody v. Reicker*, 594 F.2d 314, 317 (2d Cir. 1979) (ERISA does not prevent garnishment for support obligations).

The 1984 amendments removed most uncertainties by creating a limited exception to the anti-alienation provisions for a state domestic relations order if it is a "qualified domestic relations order" ("QDRO"). 29 U.S.C. § 1056(d)(3)(A). A domestic relations order must meet certain technical requirements to be recognized as a QDRO under ERISA. 29 U.S.C. § 1056(d)(3)(B)-(E). All parties to this case agree that the property settlement does not meet the requirements of a QDRO.

Laurine argues that since the settlement is not a QDRO, the anti-alienation provisions nullify the property settlement. She claims that the settlement can have no effect on the designation of beneficiary. ERISA prohibits the assignment or alienation of benefits, and, according to Laurine, ERISA makes an exception only for a QDRO. Laurine claims that if a marital property settlement does not qualify, ERISA benefits must be paid pursuant to the original designation of beneficiary.

Laurine is correct when she states that ERISA preempts any attempt to alienate or assign benefits by a domestic relations order if that order is not a QDRO. The marital property settlement at issue in this case, however, was not an assignment or alienation of benefits by James. In the settlement, James made no attempt to dispose of his interest. Instead, Laurine disclaimed any right she had to the benefits. Laurine, a nonparticipant in the Plan, waived her right to any benefit, just as James waived any right to benefits from Laurine's pension. This marital property settlement was incorporated into the divorce decree entered by the Circuit Court of Kane County, Illinois on September 29, 1986. That court found that the decree, presented for its consideration, "was entered into freely and voluntarily between the parties" and was "not unconscionable." Therefore that court specifically made the settlement agreement a part of the divorce decree expressly ratifying, confirming, approving, and adopting it as an order of the court. It was specifically a part of the judgment of the court that "each of the parties shall perform under the terms of said agreement."

In arguing that her waiver is preempted by ERISA, Laurine misinterprets the purpose behind the spendthrift provisions and the intended effect of a QDRO. The spendthrift provisions of ERISA are designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. H.R. REP. No. 807, 93d Cong., 2d Sess. 1974, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 4670, 4734. These provisions focus on the assignment or alienation of benefits by a participant, not the waiver of a right to payment of benefits made by a designated beneficiary. The QDRO exception is also centered on the alienation or assignment of benefits. As noted in the legislative history, "the creation, recognition, or assignment of the alternate payee's right to the benefits" will only be exempted from the spendthrift provisions if the QDRO requirements are met. S. REP. No. 575, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2547, 2565. A QDRO creates a right to payment of benefits. The marital property settlement at issue in this case waives any right to those benefits.

The QDRO requirements specify the procedures necessary to assign benefits, but those procedures need not be followed when a nonparticipant is waiving an interest in pension benefits. ERISA allows beneficiaries to waive their interests in benefits. *See, e.g.*, 29 U.S.C. § 1055(c)(1)(A)(i) (spouse may waive interest in joint and survivor form of benefit at any time). The 1984 ERISA amendments made clear that a QDRO was the proper method of preserving the interests of a former spouse in pension benefits. *See* S. REP. No. 575, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2547, 2565. As the district court noted, if the Browns had wished to secure Laurine's interest in the benefits, they could have executed a QDRO establishing such a right. Other methods were also available to establish Laurine's interest. Laurine and James could have left any mention of pension benefits out of the marital property settlement, or James could have redesignated Laurine as his beneficiary. Instead, the

Browns jointly agreed to waive all interest in each other's pension plans. Such a waiver does not fall within the scope of ERISA's spendthrift provisions. We hold that a proper waiver of interest by a nonparticipant in a plan is not preempted by ERISA's anti-alienation provisions, which in this case was incorporated by a state court into a judgment.

Laurine erroneously asserts that *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989), conflicts with this court's holding that ERISA's anti-alienation provisions do not preempt an explicit waiver of interest by a nonparticipant in a plan.[2] *Lyman* is distinguishable from the factual situation in *Fox Valley*. In *Lyman*, a participant in an employer profit-sharing plan named his wife as his primary beneficiary and his parents and a brother as contingent beneficiaries. The participant divorced his wife approximately five years after naming her as primary beneficiary under the plan. The divorce decree stated that Jeffery Hill, the plan participant, "shall have as his own, free of any interest of [his ex-wife], his interest in the profit-sharing plan of his employer. . . ." Jeffery Hill died on December 15, 1984, without having changed his plan beneficiary designation after the divorce. While the beneficiary designation provision of the Lyman plan is not quoted in the Eighth Circuit's opinion, the court noted that "[u]nder the Plan, each participant may name the beneficiaries who will receive the remainder of his vested account balances upon his death." *Id.* at 693. The Eighth Circuit cited *Fox Valley & Vicinity Construction Workers v. Brown*, 684 F. Supp. 185, 188 (N.D. Ill. 1988), when it noted that the general rule is that a divorce does not affect a beneficiary designation in a life insurance policy. Significantly, the

[2] In support of her position, Laurine also cites IRS Private Letter Ruling No. 8905058. A private letter ruling, however, may not be used or cited as precedent. *See* 26 U.S.C. § 6110(j)(3); *see also Liberty Nat'l Bank & Trust v. United States*, 867 F.2d 302, 305 (6th Cir. 1989); *David R. Webb Co. v. Commissioner*, 708 F.2d 1254, 1257 n.1 (7th Cir. 1983). Thus, we will not consider that portion of Laurine's brief which relies exclusively on the IRS private letter ruling as authority.

Eighth Circuit also cited the district court opinion in *Fox Valley* when it observed that "[t]he spouse's beneficiary interest can be divested, however, pursuant to a property settlement in a divorce judgment." *Lyman*, 877 F.2d at 693. The *Lyman* court found that the general wording of the divorce decree did not specifically refer to and modify the beneficiary interest of the participant's ex-wife. The Eighth Circuit therefore affirmed the district court's award of benefits to the primary beneficiary.[3] The *Lyman* opinion is not in conflict with this court's holding and arguably supports the result we have reached. Unlike the factual setting in *Lyman*, Laurine and James in the present case signed a voluntary property settlement agreement that included an explicit mutual waiver of any rights each might have had in the other's pension plan.

Having established that it is possible for a nonparticipant to waive an interest in pension benefits without using a QDRO, we must now determine whether there was an effective waiver of interest in this case. ERISA is silent on the issue of what constitutes a proper waiver in this situation, and the existing body of federal common law interpreting ERISA gives little guidance on this point. After finding that ERISA's anti-alienation provisions did not prohibit a waiver of pension benefits under these circumstances, the district court turned to state law and found that under Illinois law, and in most jurisdictions, a divorce decree would not affect the pension rights of a person who has been designated as a beneficiary unless the property settlement specifically included a termination of those rights. *See O'Toole v. Central Laborers' Pension and Welfare Funds*, 12 Ill. App. 3d 995, 997, 299 N.E.2d 392, 394 (1973). The district court held that the waiver in the marital property settlement was a specific termination of benefits.

[3] The district court's holding was based on its finding that the primary beneficiary's waiver of benefits was not knowing and voluntary and was therefore without effect. *Lyman*, 877 F.2d at 693.

When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits. *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986) (courts must develop federal rules when interpreting ERISA); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980) (Congress intended that courts would develop federal common law for ERISA). In making such rules, we must of course look to the statute itself for guidance, *In re White Farm Equip. Co.*, 788 F.2d 1186, 1191 (6th Cir. 1986), and it is also proper to turn to state law when creating such rules, *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985), as long as such state law is consistent with the policies underlying the federal statute at issue, *Nachwalter*, 805 F.2d at 960. The district court properly examined a closely analogous area of state law—a former spouse's right to recover life insurance benefits. In Illinois, a decree of divorce only affects the rights of a divorced spouse if a property settlement agreement specifically includes a provision terminating the beneficiary's interest. *O'Toole*, 12 Ill. App. 3d at 997, 299 N.E.2d at 394 (citations omitted). Many states follow this rule when interpreting divorce settlement provisions. *See, e.g., Prudential Ins. Co. v. Cooper*, 666 F. Supp. 190, 192 (D. Idaho 1987) (applying Idaho law), *aff'd*, 859 F.2d 154 (9th Cir. 1988); *Lincoln Nat'l Life Ins. Co. v. Blight*, 399 F. Supp. 513, 515 (E.D. Pa. 1975) (applying Pennsylvania law), *aff'd*, 538 F.2d 319 (3d Cir. 1976); *Lynch v. Bogenrief*, 237 N.W.2d 793, 798 (Iowa 1976); *Keeton v. Cherry*, 728 S.W.2d 694, 697 (Mo. Ct. App. 1987); *Bell v. Garcia*, 639 S.W.2d 185, 191 (Mo. Ct. App. 1982); *Haley v. Schleis*, 97 N.M. 561, 562, 642 P.2d 164, 165 (1982); *Culbertson v. Continental Assurance Co.*, 631 P.2d 906, 913-14 (Utah 1981). The district court was correct in finding that the waiver contained in the marital property settlement specifically dealt with the pension fund benefits, including the Death Benefit at issue in this case.

Laurine counters by pointing to other language in *O'Toole* that seems to qualify the ability of a divorce settlement to affect the rights of a beneficiary. In *O'Toole*, the Illinois court did state that only a specific waiver of benefits

would affect a beneficiary's rights "unless the policy itself or a statute provides otherwise." *O'Toole*, 12 Ill. App. 3d at 997, 299 N.E.2d at 394. As the district court pointed out, this qualification does not refer to the general method of designating a beneficiary found in the policy. Instead, the *O'Toole* court was referring to provisions or statutes that would automatically terminate a spousal interest upon divorce. Laurine's argument that only the method of changing beneficiaries provided in the Plan should be given legal effect is unpersuasive.[4]

The ability of a spouse to waive rights to a benefit through a specific waiver in a divorce settlement has been recognized by many courts and we adopt that rule for purposes of ERISA. Laurine contends that such a rule will work against ERISA's need for uniformity and bring uncertainty into the administration of the plan. We are not convinced by these arguments. As we have noted, federal courts are charged with creating federal common law rules to govern ERISA, *Nachwalter*, 805 F.2d at 959, and the creation of such federal rules will provide the needed uniformity. We also disagree with Laurine's assertion that our decision imposes burdensome obligations on plan administrators. No such additional burdens will be imposed because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a par-

[4] An Illinois appellate court has also interpreted *O'Toole v. Central Laborers' Pension and Welfare Funds*, 12 Ill. App. 3d 995, 997, 299 N.E.2d 392 (1973), as supporting a finding of waiver when the primary beneficiary executed a waiver of her rights as part of a property settlement upon dissolution of her marriage. In *Principal Mutual Life Ins. Co. v. Juntunen*, ___ Ill. App. 3d ___, 545 N.E.2d 224 (1989), the appellate court found that a provision waiving any interest in the ex-husband's life insurance policies contained in a property settlement barred the ex-wife from collecting under the policy after the ex-husband's death. As in this case, the participant/ex-husband neglected to change his beneficiary designation after the ex-spouses signed the mutual waiver, which was drafted by the ex-wife's attorney. 545 N.E.2d at 226.

ticipant and determine whether any domestic relations orders exist that could affect the distribution of benefits. This case arose from just such an investigation. Our decision only requires plan administrators to continue their current practice of thoroughly investigating the marital status of a participant.

Finally, Laurine asserts that James was unrepresented at their divorce hearing and that he did not read or understand the provisions of the property settlement, including the waiver provision. This argument is also unpersuasive. James did sign the agreement, and the waiver provision was simple and straightforward. Laurine's own lawyer inserted the waiver language, and Laurine makes no claim that she did not read or understand the settlement. She does not claim that she was unaware of what effect the waiver could have on her own claims. Laurine makes this claim even though both Laurine and James on the face of the agreement each stated under oath that they understood the contents of the property settlement.

It was suggested at oral argument that under our holding the Fund would be burdened with always having to investigate to determine if possibly there was a waiver, or something else affecting payment of the benefit to the last-named beneficiary. We place no such investigative burden or responsibility on the Fund beyond what is imposed by statute. Under the facts of this case we need only hold that the settlement waiver is effective when it becomes known to the Fund before payment. The Fund in its brief concurs in the holding we reach. We go no further.

III. CONCLUSION

The district court was correct in recognizing that a nonparticipant in an ERISA pension plan could waive rights to pension benefits. Laurine waived her right to any portion of the Death Benefit. The district court's entry of summary judgment against Laurine and in favor of Dessie is AFFIRMED.

EASTERBROOK, *Circuit Judge*, with whom BAUER, *Chief Judge*, and MANION, *Circuit Judge*, join, dissenting. Three reasons might support giving James Brown's death benefits to his mother Dessie: the order of the state court, the contract between James and his former wife Laurine, and Laurine's waiver.

The first of these is unsatisfactory because the state court's order is not a "qualified domestic relations order", 29 U.S.C. §1056(d)(3). Matrimonial law does not require one or another disposition of property in an uncontested divorce. James and Laurine were free to *agree* to anything they wanted. There is no state policy about the allocation of death benefits that could be disrupted. The state court's approval of the private settlement is like a consent decree, which should be treated like a contract. See *Firefighters v. Cleveland*, 478 U.S. 501, 517-23 (1986). Consent decrees do not alter the legal obligations of strangers (here, of the Fund to enforce its written-designation rule). *Martin v. Wilks*, 109 S. Ct. 2180 (1989).

The second (contract) is unsatisfactory because it attributes to James's act an effect other than the one specified by the Fund's governing documents—which 29 U.S.C. §1104(a)(1)(D) requires it to follow. I agree with Judge Ripple's discussion of this statute and join his opinion. See also *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (en banc); *Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1240-42 (2d Cir. 1989).

The third (waiver) is strongest because it bypasses reference to James's acts. The designated beneficiary may give away the money the instant she receives it. Waiver is an anticipatory gift, to whoever is next in line under the Fund's rules (Dessie). Because an actual gift would be honored, it follows that an anticipatory gift should be given effect. This approach, however, runs into three difficulties. The first is that it, too, requires the Fund to disregard its written-designation rule. Second, under state law (more precisely, federal common law absorbing state

law) unilateral promises to make gifts are not enforceable. There are exceptions to the non-enforcement of donative promises, but none is applicable to this case. (Dessie is not a charity!) The majority's opinion treats the waiver as if it had been signed after James's death, when Laurine would have had a present right to give the benefits to Dessie. It wasn't, she didn't, and the law distinguishes accordingly.

Even if the Plan did not contain a written-designation clause and an anticipatory gift were valid under principles of contract law, however, it would not be valid given the spendthrift clause in ERISA, 29 U.S.C. §1056(d)(1), which says that "benefits provided under the plan may not be assigned or alienated". Although the majority holds that this rule applies only to "participants" in a pension plan as 29 U.S.C. §1002(7) defines that term, it is not so limited. Section 1056(d)(1) bars the assignment of "benefits"—that is, payments under the plan—without regard to the identity of the person making that assignment. Section 1056(d)(2) reinforces this in saying that "a loan made to a participant or beneficiary shall not be treated as an assignment or alienation", an exemption unnecessary if the anti-alienation clause does not apply to beneficiaries in the first place. So Laurine could not have transferred the money to Dessie in exchange for a sofa—at least, Dessie could not have enforced the promise by attaching the benefits as they came in. Why, then, should Laurine be allowed to transfer the money to Dessie without getting a sofa?

A rule that prevents the beneficiary from giving up her claim is unappealing, but anti-alienation clauses are *designed* to frustrate individuals' desires. Equitable considerations are accordingly poor grounds on which to disregard them. *Guidry v. Sheet Metal Workers Pension Fund*, 110 S. Ct. 680, 687-88 (1990). ERISA does not stand alone in thwarting private choice. Federal insurance and annuity laws often provide that benefits must be paid to the person whose name is on file. These not only undo actual

bargains, denying beneficiaries the autonomy to choose what to do with their wealth, but also produce some weird results. Still, we enforce them. E.g., *Prudential Insurance Co. v. Parker*, 840 F.2d 6 (7th Cir. 1988). Although ERISA does not say "pay only the person whose name is on file", it does say that every plan must act "in accordance with the documents and instruments governing" it, 29 U.S.C. §1104(a)(1)(D), and this plan has a written-designation rule. Our approach therefore ought to track that of *Parker*.

Rules requiring payment to named beneficiaries yield simple administration, avoid double liability, and ensure that beneficiaries get what's coming quickly, without the folderol essential under less-certain rules. Domestic relations orders, even if "qualified", do not take effect until lodged with a plan, something 29 U.S.C. §1056(d)(3)(G)(i), (ii)(II) implies in establishing procedures for plans to evaluate orders once they have been lodged; honoring "qualified" orders on file reinforces rather than undermines the inference that pension plans may not look beyond written instructions. Written-designation rules accompany statutes that contain anti-alienation clauses, as ERISA and military insurance laws do. Perhaps this is so to ensure that the designation is an informed choice. Before accepting a change of beneficiary, the plan can provide the employee with an unbiased recap of his options and afford opportunity to reflect. We see designation rules on many other occasions. Think of the Wills Acts, requiring formality to make bequests; as a practical matter death benefits in a pension plan are bequests.

ERISA is full of unyielding rules, designed to simplify administration. Rules have their flaws; loopholes and overbreadth, both producing unpalatable outcomes in the event of unanticipated circumstances, are among them. But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation. Congress and pension plans elected to use rules rather than standards; patterns of avoidance mean that we transmute the approach Congress chose into the one it rejected.

RIPPLE, *Circuit Judge*, with whom BAUER, *Chief Judge*, EASTERBROOK, and MANION, *Circuit Judges*, join, dissenting. This case presents an important issue in the administration of ERISA. In resolving that issue, we have one task: to ascertain and implement the will of Congress. Today's decision loses sight of that objective. Consequently, unless altered by the Supreme Court or Congress, the majority's approach stands as a significant impediment to achieving the congressional goal of efficient and certain administration of employee benefit plans.

A.

As the majority quite pointedly notes, ERISA is a *federal* statute that sets *federal* standards for pension plans subject to its terms. Part of that *federal* mandate is contained in section 1104(a)(1)(D).[1] That section requires that a plan be administered in accordance with the documents and the instruments of that plan. This statutory command embodies a strong federal policy that all parties—participant, trustee, and beneficiary—be able to ascertain their rights and liabilities with certainty.[2] The plan at issue here fulfills that mandate quite explicitly. It provides that the beneficiary of the plan is the person named by the participant "in the last written notice received in the Administrative Office prior to the Participant's death. It shall be

[1] Section 1104(a)(1)(D) of the Labor Title states that a plan administrator

> shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> . . .
>
> (D) *in accordance with the documents and instruments governing the plan* . . . .

29 U.S.C. § 1104(a)(1)(D) (emphasis supplied).

[2] We have already noted this congressional insistence on certainty of rights and obligations in our interpretation of § 515 of ERISA, 29 U.S.C. § 1145. *See Central States, S.E. & S.W. Areas Pension Fund v. Gerber Truck*, 870 F.2d 1148, 1153 (7th Cir. 1989) (en banc).

the responsibility of the Participant to notify in writing the Administrative Office of his choice of Beneficiary or any change in Beneficiary." *See* R.1 at Ex. 1, § 6.4. There is no question that Laurine Brown is the person who, under the terms of the plan, ought to receive the death benefit.

In determining whether the property settlement agreement constitutes a binding waiver of these benefits on the part of Ms. Brown, this federal policy of administering the plan according to its documents must be respected in order to ensure that the purpose of ERISA is effectuated. However, the majority, by its over-reliance on state law principles, loses sight of that federal policy and, consequently, frustrates the congressional intent. Analogous principles of state law often can be helpful in interpreting a federal statute and in fashioning federal common law to close gaps in the legislative scheme. However, this methodology must be employed with extreme caution.[3] The ultimate objective is not to fulfill policy objectives of state law but to fulfill the congressional command embodied in the language and structure of the federal statute. Here, ERISA's command that a plan be administered in accordance with the plan's documents must be our primary concern in fashioning a waiver rule. The general maxims of state insurance law upon which the majority relies were not, of course, formulated with this explicit command of ERISA in mind. ERISA requires, in order to effectuate the federal policy of certainty in expectations and ease in administration, that beneficiary changes be made according to the plan's documents. The documents require that the beneficiary change be made only by notification to the plan. Therefore, absent such notification

[3] As the majority sets forth in detail, Congress took great care in specifying the precise circumstances in which ERISA's anti-alienation provisions may be overridden by a state marital property settlement decree. Such care is ample evidence of the prudence and caution necessary in any reliance on "analogous" state law concepts.

by the participant, the waiver is not binding on the beneficiary.[4]

B.

Even if we accept the proposition that, despite the lack of conformity with the statutory scheme of ERISA, a beneficiary can be considered to have waived an interest in the plan, there remains a difficult question with respect to the intent of Laurine Brown that has not been addressed satisfactorily by either the district court or the majority. The purported "waiver" is contained in a property settlement agreement executed by the parties as part of the dissolution of a marriage. That document was designed to adjust property rights between the parties "growing out of the marital or any other relationship now or previously existing between the parties." R.1 at Ex. 5. By its own terms, then, the agreement (or "waiver") does not deal with each party's choices with respect to the disposition of property after the divorce. Indeed, it is quite plausible to read the document as establishing noth-

[4] The primary federal legislative policy also renders irrelevant the fact that Ms. Brown's purported waiver is contained in a settlement agreement executed as part of a state divorce action. Even if we were to assume *arguendo* that the terms of the settlement are a manifestation of state policy because they are contained in a state judgment, we are still constrained to prefer the clear federal congressional mandate.

Similarly, if we were to construe Ms. Brown's waiver as an anticipatory gift to the contingent beneficiary, Dessie Brown, the fact remains that any such anticipatory gift would be valid, if at all, only under state law and such a state rule would contravene the federal policies embodied in ERISA. It would not only frustrate the federal mandate of section 1104(a)(1)(D) but also run afoul of ERISA's anti-alienation provision. 29 U.S.C. § 1056(d)(1). Indeed, the regulations, accompanying the corresponding tax provision, 29 U.S.C. § 401(a)(13)(A), define "assignment" and "alienation" as "[a]ny direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant *or beneficiary* a right or interest enforceable against the plan . . . ." 26 C.F.R. § 1.401(a)-13(c)(1)(ii) (emphasis supplied).

ing more than a waiver on the part of Ms. Brown of her right to insist on a QDRO[5] as part of the division of marital property. Indeed, such an interpretation is supported by the affidavit of Ms. Brown. R.16. She alleges that Mr. Brown made clear, both before and after the divorce, that he expected that the benefits would be payable to her. Consequently, despite the division of property at the time of divorce, Ms. Brown had, she maintains, a legitimate expectation that she would receive the benefits. Both she and Mr. Brown were aware that the beneficiary designation had not been changed. At the very least, then, there is a triable issue of fact as to the intent of Ms. Brown with respect to the "waiver" that cannot be resolved on summary judgment.

The majority suggests that, if Mr. Brown wanted Ms. Brown to receive the benefits, he should have executed a new beneficiary form after the divorce. However, it must be remembered that Mr. Brown knew there already was a designation that conformed to the plan on file. He was entitled to conclude that, even if Laurine Brown had waived the benefits at the time of divorce, his decision not to change the beneficiary designation amounted to a redesignation. After all, he had been informed, at the time he made the original designation, that a change could be effected only by his coming to the office and changing the beneficiary.

Accordingly, I would reverse the judgment of the district court on the ground that the "waiver" was not effective because a change in the designation of beneficiary was never made by the participant. However, even under the approach of the majority, there remains a triable issue of fact that precludes summary judgment.

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[5] ERISA permits a participant to alienate rights in a plan pursuant to a state court ordered domestic relations order that fulfills specific criteria set forth in ERISA. Such a state domestic relations order is called a "qualified domestic relations order" (QDRO). *See* 29 U.S.C. § 1056(d)(3).

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UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 6, 1989

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. JESSE E. ESCHBACH, Senior Circuit Judge

No. 88-2322

FOX VALLEY & VICINITY
CONSTRUCTION WORKERS
PENSION FUND,

Plaintiff-Appellee,

v.

LAURINE BROWN (LaMAR),

Defendant-Appellant,

and

DESSIE BROWN,

Defendant-Appellee,

ALL UNKNOWN CLAIMANTS,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division
No. 87 C 8095 - John F. Grady, *Judge*

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by counsel for defendant-appellant Laurine Brown (LaMar) in the above-entitled cause, a vote of the active members of the court having been requested, and a majority of the judges in regular active service having voted to grant a rehearing en banc,

IT IS ORDERED that the aforesaid petition for rehearing with suggestion for rehearing en banc be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on June 29, 1989 be, and are hereby, VACATED. This case will be reheard en banc at the convenience of the court.

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2322

FOX VALLEY & VICINITY CONSTRUCTION WORKERS PENSION FUND,

Plaintiff-Appellee,

v.

LAURINE BROWN (LAMAR),

Defendant-Appellant,

and

DESSIE BROWN,

Defendant-Appellee,

and

ALL UNKNOWN CLAIMANTS,

Defendants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 8095—John F. Grady, *Judge.*

ARGUED JANUARY 18, 1989—DECIDED JUNE 29, 1989

Before WOOD, JR. and RIPPLE, *Circuit Judges,* and ESCHBACH, *Senior Circuit Judge.*

WOOD, JR., *Circuit Judge.* This is an interpleader action filed by the Fox Valley & Vicinity Construction Workers Pension Fund ("Fund") to determine the proper recipient of a death benefit payable because of the death of Fund participant James Brown ("James"). The defendants in the action are Laurine Brown ("Laurine"), James' former spouse, and Dessie Brown ("Dessie"), James' mother. The district court denied Laurine's motion for summary judgment and entered summary judgment against Laurine and in favor of Dessie, ordering the Fund to pay the death benefit to Dessie. Laurine appeals this decision.

The Fund brought this interpleader action under 28 U.S.C. § 1335. The district court had jurisdiction pursuant to 29 U.S.C. § 1132(e). This case raises issues under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461, and we have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

I. FACTUAL BACKGROUND

Laurine and James were married on April 14, 1982. James was covered by the Fox Valley & Vicinity Construction Workers Pension Plan ("Plan"), which provided for a Lump Sum Death Benefit ("Death Benefit") payable to the plan participant's designated beneficiary if the participant died before reaching retirement age. The Plan specifies how a participant may designate a beneficiary:

> The Participant's Beneficiary shall be the person or persons he so designates in the last written notice received in the Administrative Office prior to the Participant's death. It shall be the responsibility of the Participant to notify in writing the Administrative Office of his choice of Beneficiary or any change in Beneficiary. A Participant may, without the consent of his then designated Beneficiary, or Beneficiaries, change his Beneficiaries. In the event that the [P]articipant shall fail to name a Beneficiary, or if such Beneficiary shall not be living at the time of the Participant's death, such benefits shall be paid to:

(a) his legal spouse, if living;

(b) if no spouse be living, then to his living children in equal shares;

(c) if no spouse or children be living, then to his parents in equal shares, or the survivor of such parents if only one (1) be living;

(d) if no spouse, children, or parents be living, then to his living brothers and sisters in equal shares;

(e) if no spouse, children, parents, or brothers and sisters be living, then to the estate of such deceased Participant.

In 1986, James executed a Beneficiary Designation Form naming Laurine as his beneficiary. On September 29, 1986, Laurine and James were divorced. They both agreed to a court-approved property settlement that included the following proviso:

> The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party.

Even after their divorce, James continued to live with Laurine for much of 1986 and 1987. James made no effort to change his designated beneficiary after the divorce. James died on June 17, 1987.

This dispute arose when Laurine attempted to have the Death Benefit paid to her. The Fund refused, claiming that it was uncertain who should receive the Death Benefit. The Fund then filed this interpleader action, asserting that although Laurine was the designated beneficiary, it was uncertain as to the legal effect of the marital property settlement agreement in which Laurine seemingly waived her right to any benefits from the Fund. The Fund also named Dessie as a defendent since, under the Plan, Dessie would receive the benefit if the court determined that Laurine properly waived her claim.

Laurine moved for summary judgment on October 21, 1987, arguing that James, who was unrepresented at their divorce hearing, never read or understood the terms of the marital property settlement, which had been prepared by her lawyer. Laurine also asserted that even after the divorce, James intended for her to receive benefits from the Fund. The district court denied Laurine's motion for summary judgment. The court then entered summary judgment against Laurine and in favor of Dessie, finding that Laurine had waived her right to the Death Benefit. In this appeal, Laurine finds fault with the district court's use of the marital property settlement agreement. Laurine claims the court erred when it allowed the marital property settlement to affect Laurine's right under the Plan.

II. DISCUSSION

Summary judgment should be granted only when there are no genuine issues of material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 50(c). There were no disputed facts in this case and the district court found that, as a matter of law, the death benefit should be paid to Dessie. We review that decision *de novo*. *EEOC v. Sears, Roebuck & Co.*, 839 F.2d 302, 354 (7th Cir. 1988).

As the district court noted, this is a case of first impression under ERISA. We must determine whether a divorced spouse who was designated as a beneficiary prior to the divorce will still receive the Death Benefit despite a provision in the divorce settlement waiving any rights to the benefit. Because ERISA preempts state pension benefit laws, 29 U.S.C. § 1144(a), we must find the answer to this issue within ERISA itself or in the federal common law interpreting ERISA. *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (state law relating to employee benefit plans preempted); *Mutual Life Ins. Co. of New York v. Yampol*, 840 F.2d 421, 425 (7th Cir. 1988) (uniform remedies are fundamental to ERISA). In this case, our

attention is focused on ERISA's anti-alienation provisions. 29 U.S.C. § 1056(d)(1), (d)(3)(A).

ERISA provides that a pension plan must prohibit the alienation or assignment of benefits. 29 U.S.C. § 1056(d)(1). These "spendthrift" provisions are designed to prevent unwise alienation or assignment. *AT&T v. Merry*, 592 F. 2d 118, 124 (2d Cir. 1979). ERISA was amended in 1984 to clarify the effect of these spendthrift provisions on family support obligations such as alimony, child support, and separate maintenance. Retirement Equity Act of 1984, Pub. L. 98-397, 98 Stat. 1433 (1984). *See* S. Rep. No. 575, 98th Cong., 2d Sess. 18-19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2564-65. Prior to the enactment of these amendments, some courts tentatively exempted state domestic relations orders from the ERISA anti-alienation provisions. *See, e.g., Operating Engineers' Local # 428 Pension Trust Fund v. Zamborsky*, 650 F.2d 196, 200 (9th Cir. 1981) (order assigning benefits for alimony not in conflict with ERISA); *AT&T v. Merry*, 592 F.2d at 124-25 (ERISA provisions do not alter traditional support obligations); *Cody v. Reicker*, 594 F.2d 314, 317 (2d Cir. 1979) (ERISA does not prevent garnishment for support obligations).

The 1984 amendments removed most uncertainties by creating a limited exception to the anti-alienation provisions for a state domestic relations order if the order is a "qualified domestic relations order" ("QDRO"). 29 U.S.C. § 1056(d)(3)(A). A domestic relations order must meet certain technical requirements to be recognized as a QDRO under ERISA. 29 U.S.C. § 1056(d)(3)(B)-(E). All parties to this case agree that the property settlement does not meet the requirements of a QDRO.

Laurine argues that since the settlement is not a QDRO, the anti-alienation provisions nullify the property settlement. She claims that the settlement can have no effect on the designation of beneficiary. ERISA prohibits the assignment or alienation of benefits and, according to Laurine, ERISA makes an exception only for a QDRO. Laurine claims that if a marital property settlement does not

qualify, ERISA benefits must be paid pursuant to the original designation of beneficiary.

Laurine is correct when she states that ERISA preempts any attempt to alienate or assign benefits by a domestic relations order if that order is not a QDRO. However, the marital property settlement at issue in this case was not an assignment or alienation of benefits by James. In the settlement, James made no attempt to dispose of his interest. Instead, Laurine disclaimed any right she had to the benefits. Laurine, a non-participant in the Plan, waived her right to any benefit, just as James waived any right to benefits from Laurine's pension. Such a waiver is not preempted by ERISA's spendthrift provisions.

In arguing that her waiver is preempted by ERISA, Laurine misinterprets the purpose behind the spendthrift provisions and the intended effect of a QDRO. The spendthrift provisions of ERISA are designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. H.R. Rep. No. 807, 93d Cong., 2d Sess. 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4734. These provisions focus on the assignment or alienation of benefits by a participant, not the waiver of a right to payment of benefits made by a designated beneficiary. The QDRO exception is also centered on the alienation or assignment of benefits. As noted in the legislative history, "the creation, recognition, or assignment of the alternate payee's right to the benefits" will only be exempted from the spendthrift provisions if the QDRO requirements are met. S. Rep. No. 575, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2565. A QDRO creates a right to payment of benefits. The marital property settlement at issue in this case waives right to payment.

The QDRO requirements specify the procedures necessary to assign benefits, but those procedures need not be followed when a non-participant is waiving an interest in pension benefits. ERISA allows beneficiaries to waive their interests in benefits. *See, e.g.*, 29 U.S.C. § 1055(c)(1)(A)(i)

(spouse may waive interest in joint and survivor form of benefit at any time). The 1984 ERISA amendments made clear that a QDRO was the proper method of preserving the interests of a former spouse in pension benefits. *See* S. Rep. No. 575, 98th Cong., 2d Sess. 19, *reprinted in* 1984 U.S. Code Cong. & Admin. News 2547, 2565. As the district court noted, if the Browns had wished to secure Laurine's interest in the benefits, they could have executed a QDRO establishing such a right. Other methods were also available to establish Laurine's interest. Laurine and James could have left any mention of pension benefits out of the marital property settlement, or James could have redesignated Laurine as his beneficiary. Instead, the Browns jointly agreed to waive all interest in each other's pension plans. Such a waiver does not fall within the scope of ERISA's spendthrift provisions. We hold that a proper waiver of interest by a non-participant in a plan is not preempted by ERISA's anti-alienation provisions.

Having established that it is possible for a non-participant to waive an interest in pension benefits without using a QDRO, we must now determine whether there was an effective waiver of interest in this case. ERISA is silent on the issue of what constitutes a proper waiver in this situation and the existing body of federal common law interpreting ERISA gives little guidance on this point. After finding that ERISA's anti-alienation provisions did not prohibit a waiver of pension benefits under these circumstances, the district court turned to state law and found that under Illinois law, and in most jurisdictions, a divorce decree would not affect the pension rights of a person who has been designated as a beneficiary unless the property settlement specifically included a termination of those rights. *See O'Toole v. Central Laborers' Pension and Welfare Funds*, 12 Ill. App. 3d 995, 997, 299 N.E.2d 392, 394 (1973). The district court held that the waiver in the marital property settlement was a specific termination of benefits.

When ERISA is silent on an issue, a federal court must fashion federal common law rules to govern ERISA suits.

Nachwalter v. Christie, 805 F.2d 956, 959 (11th Cir. 1986) (courts must develop federal rules when interpreting ERISA); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980) (Congress intended that courts would develop federal common law for ERISA). In making such rules, we must of course look to the statute itself for guidance, *In Re White Farm Equipment Co.*, 788 F.2d 1186, 1191 (6th Cir. 1986), and it is also proper to turn to state law when creating such rules, *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1502 (9th Cir. 1985), as long as such state law is consistent with the policies underlying the federal statute at issue, *Nachwalter*, 805 F.2d at 960. The district court properly examined a closely analogous area of state law—a former spouse's right to recover life insurance benefits. In Illinois, a decree of divorce only affects the rights of a divorced spouse if a property settlement agreement specifically includes a provision terminating the beneficiary's interest. *O'Toole*, 12 Ill. App. 3d at 997, 299 N.E.2d at 394 (citations omitted). Many states follow this rule when interpreting divorce settlement provisions. *See, e.g., Bell v. Garcia*, 639 S.W.2d 185 (Mo. Ct. App. 1982); *Culbertson v. Continental Assur. Co.*, 631 P.2d 906 (Utah 1981); *Lynch v. Bogenrief*, 237 N.W.2d 793 (Iowa 1976). The district court was correct in finding that the waiver contained in the marital property settlement specifically dealt with the pension fund benefits, including the Death Benefit at issue in this case.

Laurine counters by pointing to other language in *O'Toole* that seems to qualify the ability of a divorce settlement to affect the rights of a beneficiary. In *O'Toole*, the Illinois courts did state that only a specific waiver of benefits would affect a beneficiary's rights "unless the policy itself or a statute provides otherwise." *O'Toole*, 12 Ill. App. 3d at 997, 299 N.E.2d at 394. As the district court pointed out, this qualification does not refer to the general method of designating a beneficiary found in the policy. Instead, the *O'Toole* court was referring to pro-

visions or statutes that would automatically terminate a spousal interest upon divorce. Laurine's argument that only the method of changing beneficiaries provided in the Plan should be given legal effect is unpersuasive.

The ability of a spouse to waive rights to a benefit through a specific waiver in a divorce settlement has been recognized by many courts and we adopt that rule for purposes of ERISA. Laurine contends that such a rule will work against ERISA's need for uniformity and bring uncertainty into the administration of the plan. We are not convinced by these arguments. As we have noted, federal courts are charged with creating federal common law rules to govern ERISA. *Nachwalter*, 805 F.2d at 959, and the creation of such federal rules will provide the needed uniformity. We also disagree with Laurine's assertion that our decision imposes burdensome obligations on plan administrators. No such additional burdens will be imposed because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits. This case arose from just such an investigation. Our decision only requires plan administrators to continue their current practice of thoroughly investigating the marital status of a participant.

Finally, Laurine asserts that James was unrepresented at their divorce hearing and that he did not read or understand the provisions of the property settlement, including the waiver provision. This argument is also unpersuasive. James did sign the agreement and the waiver provision was simple and straightforward. Laurine's own lawyer inserted the waiver language and Laurine makes no claim that she did not read or understand the settlement. She does not claim that she was unaware of what effect the waiver could have on her own claims.

III. CONCLUSION

The district court was correct in recognizing that a non-participant in an ERISA pension plan could waive rights to pension benefits. Laurine waived her right to any portion of the Death Benefit. The district court's entry of summary judgment against Laurine and in favor of Dessie is AFFIRMED.

RIPPLE, *Circuit Judge*, dissenting. This case presents an important and difficult issue that ought to be resolved precisely by statute and regulation. In the absence of such guidance, my brothers have attempted to fashion a judicial resolution that is in harmony with the statute. While I find myself in respectful disagreement with the approach adopted, I must acknowledge, at the outset, the difficulty of the task.

A.

In my view, the starting point of our analysis must be the mandate of section 1104(a)(1)(D).[1] It requires that a plan be administered in accordance with the documents and the instruments of that plan. In my view, this statutory mandate embodies a strong federal policy that all parties—participant, trustee, and beneficiary—be able to ascertain their rights and liabilities with ease and certain-

[1] Section 1104(a)(1)(D) of the Labor Title states that a plan administrator

> shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> . . . .
>
> (D) *in accordance with the documents and instruments governing the plan* . . . .

29 U.S.C. § 1104(a)(1)(D) (emphasis supplied).

ty.[2] The plan at issue here fulfills that mandate quite explicitly. It provides that the beneficiary of the plan is the person named by the participant "in the last written notice received in the Administrative Office prior to the Participant's death. It shall be the responsibility of the Participant to notify in writing the Administrative Office of his choice of Beneficiary or any change in Beneficiary." *See* R.1 at Ex. 1, § 6.4. There is no question that Laurine Brown is the person who, under the terms of the plan, ought to receive the death benefit.

The remaining question—and the difficult one for us—is whether the property settlement agreement signed by both Laurine Brown and the participant, James Brown, constitutes a binding waiver of these benefits on the part of Ms. Brown. My brothers note that ERISA does not provide an explicit answer as to what constitutes a binding waiver of benefits by the beneficiary. They also note, correctly, that the issue must be decided as a matter of federal law in order to ensure that the purpose of ERISA is effectuated.

It is at the next point in the analysis that I must depart from my brothers' approach. While analogous principles of state law can indeed be helpful in filling the gaps of a federal statute, we must exercise extreme caution in employing that methodology. It is important to remember that our mission is not to fulfill the intent of the state legislature whose statute we are borrowing, but to fulfill

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[2] As the House Report accompanying ERISA emphasizes:

> Descriptions of plans furnished to employees should be presented in a manner that an average and reasonable worker participant can understand intelligently. It is grossly unfair to hold an employee accountable for acts which disqualify him from benefits, if he had no knowledge of these acts, or if these conditions were stated in a misleading or incomprehensible manner in plan booklets.

H. Rep. No. 93-533, 93d Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4646.

the congressional command embodied in the language and the structure of the federal statute. Therefore, in fashioning a waiver rule, ERISA's command that a plan be administered in accordance with the plan's documents must be taken into account. Only then can we be confident that the federal policy of ensuring that all parties be aware of their rights and obligations is protected adequately. The general maxims of state insurance law upon which the majority relies were not, of course, fashioned with this explicit command of ERISA in mind. Therefore, we must be sure that their application is compatible with this congressional mandate. In my view, that compatability can be accomplished by acknowledging that these general maxims of insurance law permit the renunciation of benefits only *if* such a renunciation is permitted by statute. *See O'Toole v. Central Laborers' Pension & Welfare Funds*, 299 N.E.2d 392, 394 (Ill. App. Ct. 1973). ERISA requires, in order to effectuate the federal policy of certainty in expectations and ease in administration, that beneficiary changes be made according to the plan's documents. Here, the documents require that the beneficiary change be made only by notification to the plan. Therefore, absent such notification by the participant, the waiver is not binding on the beneficiary.

B.

Even if we accept the proposition that, despite the lack of conformity with the statutory scheme of ERISA, a beneficiary can be considered to have waived an interest in the plan, there remains a difficult question with respect to the intent of Laurine Brown that has not been addressed satisfactorily by either the district court or the majority. The purported "waiver" is contained in a property settlement agreement executed by the parties as part of the dissolution of a marriage. That document was designed to adjust property rights between the parties "growing out of the marital or any other relationship now or previously existing between the parties." R.1 at Ex. 5. By its own terms, then, the agreement (or "waiver") does

not deal with each party's choices with respect to the disposition of property after the divorce. Indeed, it is quite plausible to read the document as establishing nothing more than a waiver on the part of Ms. Brown of her right to insist on a QDRO[3] as part of the division of marital property. Indeed, such an interpretation is supported by the affidavit of Ms. Brown. R.16. She alleges that Mr. Brown made clear, both before and after the divorce, that he expected that the benefits would be payable to her. Consequently, despite the division of property at the time of divorce, Ms. Brown had, she maintains, a legitimate expectation that she would receive the benefits. Both she and Mr. Brown were aware that the beneficiary designation had not been changed.[4] At the very least, then, there is a triable issue of fact as to the intent of Ms. Brown with respect to the "waiver" that cannot be resolved on summary judgment.

Accordingly, I would reverse the judgment of the district court on the ground that the "waiver" was not effective because a change in the designation of beneficiary was never made by the participant. However, even under the approach of my brothers, there remains a triable issue of fact that precludes summary judgment.

---

[3] ERISA permits a participant to alienate rights in a plan pursuant to a state-court-ordered domestic relations order that fulfills specific criteria set forth in ERISA. Such a state domestic relations order is called a "qualified domestic relations order" (QDRO). *See* 29 U.S.C. § 1056(d)(3).

[4] The majority suggests that, if Mr. Brown wanted Ms. Brown to receive the benefits, he should have executed a new beneficiary form after the divorce. However, it must be remembered that Mr. Brown knew there already was a designation that conformed to the plan on file. He was entitled to conclude that, even if Laurine Brown had waived the benefits at the time of divorce, his decision not to change the beneficiary designation amounted to a redesignation. After all, he had been informed, at the time he made the original designation, that a change could be effected only by his coming to the office and changing the beneficiary.

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USCA 79004—Midwest Law Printing Co., Inc., Chicago—6-29-89—500

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FOX VALLEY AND VICINITY CONSTRUCTION WORKERS PENSION FUND,	)	
Plaintiff,	)	No. 87C8095
v.	)	
LAURINE BROWN, DESSIE BROWN, and all unknown claimants,	)	
Defendants.	)	

JUDGMENT ORDER

This cause came to be heard on defendant Laurine Brown's motion for reconsideration of our memorandum decision of April 4, 1988. The court having considered the memoranda of the parties, and having denied defendant Laurine Brown's motion for reconsideration, it is hereby

ORDERED AND ADJUDGED that summary judgment be granted in favor of Dessie Brown and against Laurine Brown. We direct the Clerk of the Court to pay $5,821.64 to Dessie Brown. This order is stayed until July 15, 1988.

DATED: JUN 8 1988

ENTER: John F. Grady
United States District Judge

87-08095.188

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

FOX VALLEY AND VICINITY CONSTRUCTION WORKERS PENSION FUND,	)	DOCKETED June 10, 1988
Plaintiff,	)	No. 87C8095
v.	)	
LAURINE BROWN, DESSIE BROWN and all unknown claimants,	)	
Defendants.	)	

MEMORANDUM OPINION

Defendant Laurine Brown ("Laurine") has moved for reconsideration of our memorandum decision of April 4, 1988. Laurine has not brought to our attention any new authorities or arguments which persuade us to change our previous opinion. However, there are three points which we wish to make.

First, Laurine argues that "[e]ven if James [Brown] had sent a new designation of beneficiary to the pension administrator after the divorce, again designating Laurine, it would have been ineffective based upon" our April 4 opinion. We disagree. If James had designated Laurine as beneficiary

subsequent to the marital property settlement, this later designation would have prevailed. However, as we point out in our earlier opinion, James first designated Laurine as his beneficiary. After he designated her, both Laurine and James waived rights to each other's pension benefits. This waiver extinguished Laurine's right to James's lump sum death benefit ("LSDB"). If James had wished to re-establish Laurine's right to the LSDB, he could have done so by redesignating her as the beneficiary.

Second, Laurine has apparently chosen not to argue, as we suggested she might, that James "made a binding promise to direct his LSDB to Laurine subsequent to the marital property settlement." Memorandum Opinion at 12. In any event, upon further reflection, we believe that she probably could not raise such a breach of promise claim in this interpleader action. If she could maintain such a claim, she could do so only against James's estate. Because James's estate is not a defendant in this interpleader action, we could not entertain the suggested claim.

Third, we acknowledge Laurine's affidavit stating that James was neither the adoptive nor natural father of her daughter. Therefore, we are confident that Laurine's daughter is not a possible beneficiary under the plan.

In sum, we deny the motion of Laurine Brown to reconsider our opinion of April 4, 1988. We have concluded that no genuine issue of material fact exists, and that Dessie Brown is entitled to judgment as a

matter of law (for the reasons stated in our April 4, 1988 opinion). Therefore,

IT IS ORDERED that summary judgment be granted in favor of Dessie Brown and against Laurine Brown. We direct the Clerk of the Court to pay $5,821.64 to Dessie Brown. This order is stayed until July 15, 1988.

DATED: JUN 8 1988

ENTER: John F. Grady
United States District Judge

No. 87-8095.188

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

FOX VALLEY AND VICINITY CONSTRUCTION WORKERS PENSION FUND,	)	
	)	DOCKETED
Plaintiff,	)	April 5 1988
v.	)	No. 87 C 8095
LAURINE BROWN (LA MAR), DESSIE BROWN and all unknown claimants,	)	
Defendants.	)	

MEMORANDUM OPINION

This interpleader action comes before us on defendant Laurine Brown's[1] motion for summary judgment. We deny Laurine's motion. We find on the record before us that the $5,821.64 in question belongs to defendant Dessie Brown. However, we reserve entry of judgment pending further submissions by the parties.

[1]Ms. Brown is now Ms. LaMar. We will refer to her as Laurine in this opinion.

FACTS

There are no disputed facts in this case. James Brown ("James") was covered by the Fox Valley and Vicinity Construction Workers Pension Fund ("Fund"). Plaintiff's complaint at ¶ 3. The Fund administered the Fox Valley and Vicinity Construction Workers Pension Plan ("Plan"). Complaint at Exhibit 1. The Plan offers several forms of pension benefits to participants, including a Lump Sum Death Benefit ("LSDB"). *Id.* If a participant dies before retirement age, the Plan calls for payment of an LSDB to the participant's designated beneficiary. Id. The LSDB represents a percentage of the employer's contributions to the Plan on behalf of the participant.

The Plan contains a special provision describing how a participant may designate a beneficiary:

> The Participant's Beneficiary shall be the person or persons he so designates in the last written notice received in the Administrative Office prior to the Participant's death. It shall be the responsibility of the Participant to notify in writing the Administrative Office of his choice of Beneficiary or any change in Beneficiary. A Participant may, without the consent of his designated Beneficiary or Beneficiaries, change his Beneficiaries. In the event that Participant shall fail to name a Beneficiary, or if such Beneficiary shall not be living at the time of the Participant's death, such benefits shall be paid to:
>
> (a) his legal spouse, if living;

(b) If no spouse be living, then to his living children in equal shares;
(c) if no spouse or children be living, then to his parents in equal shares, or to the survivor of such parents if only one (1) be living;
(d) if no spouse, children, or parents be living, then to his living brothers and sisters in equal shares;
(e) if no spouse, children, parents, or brothers and sisters be living, then to the estate of such deceased Participant.

Id.

On April 14, 1982, James married Laurine, a resident of Illinois. Id. at ¶ 7; Affidavit of Laurine at ¶ 2. On or about March 10, 1986, James executed the Fund's "Beneficiary Designation Form," naming Laurine as his beneficiary. Complaint at ¶ 8. On September 29, 1986, James and Laurine were divorced. Id. at ¶ 9. They entered into a court-approved marital property settlement agreement which provided in pertinent part:

> The parties each waive any interest or claim in and to any retirement, pension, profit-sharing and/or annuity plans resulting from the employment of the other party.

Id. at Exhibit 5.

Despite their divorce, James resided with Laurine for several long periods in 1986 and 1987. Affidavit of Laurine at ¶¶ 11, 12. On June 17, 1987, James died.

Plaintiff's Complaint at Exhibit 2. Under the Plan, James's beneficiary should receive an LSDB of $5,821.64. Id. at ¶ 16. If Laurine is not James's "designated beneficiary," the terms of the Plan direct payment of the LSDB to Ms. Dessie Brown ("Dessie"), as James's sole surviving parent. Affidavit of Dessie. Dessie resides in Alabama. Answer Of Dessie; Cross-Claim of Dessie. Uncertain as to Laurine's status as "designated beneficiary" subsequent to her divorce from James, the Fund brought this interpleader action. 28 U.S.C. § 1335.[2] The Fund has placed $5,821.64 in an interest-bearing escrow account with this court. Order of October 23, 1987.

On October 21, 1987, Laurine moved for summary judgment. She submitted a supporting affidavit in which she states that James was unrepresented at their divorce proceeding and did not read the terms of their marital property settlement agreement which was prepared by her lawyer. Affidavit of Laurine at ¶ 10. She also asserts that, on several occasions after their divorce, James told her to contact a union official who "would see" that she and her daughter "would be taken care of in the event that anything happened" to him. Id. at ¶ 12. In Laurine's words, "[a]t all times when the matter was discussed both before and after the divorce it was the expressed intention of James that I [Laurine]

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[2]We note that we may also have federal question jurisdiction under ERISA, 29 U.S.C. § 1132(a)(3). However, because there is minimal diversity between the claimants, and more than $500.00 in controversy, we have proper jurisdiction for this statutory interpleader action. 28 U.S.C. § 1335.

receive whatever benefit there might be from his insurance or pension plan." Id.

We note that the parties have not addressed in their memorandum whether James's statements to Laurine constituted binding promises. The parties argue only over whether these statements reflect James's intention that Laurine receive the LSDB. Moreover, the parties' affidavits do not clarify the precise relationship between Laurine's daughter and James.

DISCUSSION

This motion for summary judgment presents an issue of first impression under the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq ("ERISA"): whether a divorced wife, designated as an LSDB beneficiary according to the terms of a pension plan before a divorce, may receive an LSDB despite a divorce settlement agreement containing a mutual waiver of the parties' rights to each other's pension benefits.

A preliminary question is what law governs Laurine and Dessie's rights to the LSDB. ERISA regulates pension programs such as the Plan and preempts state pension benefit law. 29 U.S.C. § 1144(a). See Mutual Life Insurance Company of New York v. Yampol, ___ F.2d ___, slip op. at 9, No. 83 C 8701 (7th Cir. February 5, 1988). Therefore, we must apply ERISA or the body of federal common law which has developed around it. Soft Drink Industry Local Union No. 744 Pension Fund v. Coca-Cola Bottling Co. of Chicago,

_____ F. Supp. ___, No. 87 C 4178, Memorandum Op. at 13-19 (N.D. Ill. January 15, 1988) (Grady, C.J.). Unfortunately, neither the text of ERISA nor existing federal common law provides a clear answer to the issue raised here. Accordingly, we must determine for ourselves the proper federal common law principles which govern this case.

In fashioning federal common law, we may look for guidance to state law. United States v. Best, 573 F.2d 1095, 1102 (9th Cir. 1978). The parties have pointed us to a closely analogous area of state law involving a former spouse's right to recover life insurance benefits. The rule in Illinois and a majority of jurisdictions is that a

> decree of divorce in no way affects the rights of the divorced wife as a beneficiary in a husband's life insurance policy. Only if a property settlement agreement should specifically include a termination of the beneficiary's interest, will the right to the proceeds of a policy on the life of the husband be affected, unless the policy itself . . . or a statute provides otherwise.

O'Toole v. Central Laborers Pension and Welfare Funds, 12 Ill. App. 3d 995, 299 N.E.2d 392, 394 (3d Dist. 1973); see also Appelman, Insurance Law and Practice § 804 (1966); Couch on Insurance 2d § 27:112 (1984). Applying this rule to the case at hand, Laurine could not recover James's LSDB because their marital property settlement contained a specific waiver as to pension benefits. Moreover, no statute or clause in the

Plan governs the effect of divorce decrees upon Plan benefits.

In her memorandum, Laurine relies upon the last clause of the above-quoted O'Toole passage. She argues that the Plan "itself provides otherwise" because, under its terms, the "[b]eneficiary shall be the person or persons [the participant] designates in the last written notice received" by the Fund. Plaintiff's Complaint at Exhibit 1 (emphasis added). Laurine misinterprets O'Toole. In the proviso cited by Laurine, the O'Toole court was referring to a provision in a policy which preserves or "terminates a spouse's interest upon divorce," 299 N.E.2d at 394, not one which establishes general procedures for designating a beneficiary.

Furthermore, Laurine cites Cox v. Employers Life Insurance Company of Warsaw, 25 Ill. App. 3d 12, 322 N.E.2d 555 (5th Dist. 1975) and Suga v. Suga, 35 Ill. App. 2d 366, 182 N.E.2d 922 (1st Dist. 1962), for the proposition that "when an insurance policy regulates the method for changing the beneficiary, the method specified is generally exclusive." O'Toole, 322 N.E.2d at 560. She argues that the Browns' property settlement did not comply with the Plan's exclusive method for changing beneficiaries, which required James to file a new "Designation of Beneficiary" form.

Laurine's argument is not persuasive. First, Suga concerned the effect of a revocable will, not a marital property settlement, upon the designation of a beneficiary in a life insurance policy. 182 N.E.2d at 924. Second, in Cox, the court relied on O'Toole and

held that a former wife could receive life insurance benefits as a "designated beneficiary" even though, subsequent to her designation, she and her husband divorced and executed a marital property settlement which did not specifically address the insurance policy. O'Toole, 322 N.E.2d at 560. The Cox holding is thus consistent with the O'Toole rule requiring a marital property settlement to contain a specific waiver of policy rights in order to extinguish a former spouse's interest. However, as Laurine points out, the Cox court inexplicably discussed the Suga case:

> The rationale of O'Toole is consistent with the opinion of the First District Court in Suga v. Suga, 35 Ill.App.2d 355, 182 N.E.2d 922 (1962), where that court held that when an insurance policy regulates the method for changing the beneficiary, the method specified is generally exclusive, and therefore, the beneficiary could not be changed by will. In the instant case, the policy provided that, to effect a change of beneficiary, the insured was required to file a written request through the policyholder. The property settlement agreement in this case in no way complies with this requirement and, therefore, would be ineffective to change the beneficiary of the insurance policy as was the will in Suga.

Id. We do not agree with the Cox court's dictum. If this dictum were the proper rule, a waiver of life insurance rights in a marital property settlement, no matter how specific, could never extinguish a former spouse's designation as beneficiary under any insurance

policy which requires, as most do, that the participant notify the plan in writing of any change. We do not believe that the Cox court's dictum was intended to effectively negate the general rule that a marital property settlement containing a specific waiver of life insurance rights terminates a former spouse's interest as the designated beneficiary of a life insurance contract.

In addition to examining analogous state common law decisions, we also consider whether a contemplated federal common law principle promotes the relevant federal interest in the case. The Supreme Court has noted that "the ultimate statement of [that federal interest] is derived from a federal statute." Banco Nacionale de Cuba v. Sabbatino, 376 U.S. 398, 427 (1963). Obviously, ERISA does not expressly govern the situation presented by this case. However, ERISA does address the effect of a divorce settlement agreement upon pension rights in a somewhat different context.

If a former spouse seeks to recover a living participant's pension benefits pursuant to a marital property decree, ERISA will often prevent that recovery. The general rule is that ERISA's prohibition against the alienation or assignment of pension benefits supersedes any domestic relations order. 29 U.S.C. § 1056(d) (1), (d) (3) (A). However, ERISA provides an exception if the marital property decree is a qualified domestic relations order ("QDRO"). The statute sets forth several requirements for establishing QDRO status. See 29 U.S.C. § 1056(d)(3)(A)-(F). Essentially, a QDRO must specifically identify an "alternate payee" (normally the former spouse) and detail the extent of

his or her interest in the participant's pension benefits. Id.

We acknowledge that the rationale underlying both this general rule denying effect to marital property decrees and the QDRO exception does not apply with full force to this case. Undoubtedly, ERISA's prohibition against the alienation and assignment of pension benefits was designed primarily to protect spendthrift pension plan participants and their dependents. Nevertheless, ERISA does seem to favor the QDRO as the proper method to preserve a former spouse's interest in pension benefits. In rejecting Laurine's attempt to recover James's LSDB, we remain consistent with this ERISA policy. If the Browns had wished to reserve Laurine's interest in James's pension benefits, they could have executed a QDRO establishing her right to James's LSDB. They did not do so. In fact, they executed a document providing for just the opposite -- that Laurine would have no interest in James's pension benefits. Therefore, our adoption in this case of the state common law rule which would deny James's LSDB to Laurine is consistent with the general ERISA policy favoring the QDRO as the proper method to preserve a former spouse's interest in pension benefits.[3]

For all these reasons, we adopt the majority rule regarding a former spouse's right to life insurance

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[3]We do not decide today whether a former spouse can recover an LSDB only if the parties' rights are governed by a QDRO.

benefits as the federal common law for pension benefits. We hold that a marital property settlement will affect the beneficiary designation for an LSDB under an ERISA plan when the settlement contains specific terms regarding pension benefits. Here, James and Laurine's marital property settlement contained an explicit mutual waiver of all pension rights. Therefore, the Browns' marital property settlement extinguishes Laurine's claim to James's LSDB.[4]

If Laurine cannot receive James's LSDB, the Plan provides a mechanism for determining the proper beneficiary in the absence of a qualified designated beneficiary. On the basis of the affidavits before us, James had no living spouse or children and only one living parent. Affidavit of Dessie. Pursuant to the terms of the Plan, Dessie should therefore receive James's LSDB.

Though it appears that James's LSDB belongs to Dessie, we will delay entry of judgment. As noted above, the exact nature of James's alleged promises to Laurine subsequent to their divorce but prior to his death is unclear. The parties have not addressed whether James made a binding promise to direct his LSDB to Laurine subsequent to the marital property settlement and, if so, whether such a promise would affect our decision. Moreover, it is not clear whether

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[4]We note that the Plan is a stakeholder here and has not paid out pursuant to the beneficiary designation it had on file. We are not faced with the question of whether the Plan could be liable for paying out pursuant to a beneficiary designation which is in conflict with a waiver in a settlement agreement.

Laurine's daughter has any interest in James's LSDB.[5] Laurine is granted leave to file a brief addressing these issues, with supplementary affidavits, by April 22, 1988. Dessie and the Plan may respond by May 13, 1988. Laurine has until May 27, 1988 to file a reply.

CONCLUSION

We deny the motion of defendant Laurine Brown for summary judgment. We find on the record before us that the $5,821.64 in question belongs to defendant Dessie Brown, but reserve entry of judgment pending further submissions by the parties.

DATED: APR 4 1988

ENTER: John F. Grady
United States District Judge

[5]Based on the affidavits before us, we do not know whether James was the natural or adoptive father of Laurine's daughter. We assume that he was not the natural or adoptive father. However, we direct Laurine to submit affidavits or documentation establishing James's relation to her daughter.

Supreme Court, U.S.
FILED
JUL 6 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1945

In The

Supreme Court of the United States

October Term, 1989

LAURINE BROWN (LaMAR),

Petitioner,

v.

FOX VALLEY & VICINITY CONSTRUCTION WORKERS PENSION FUND, DESSIE BROWN, AND ALL UNKNOWN CLAIMANTS,

Respondents.

On Petition For a Writ of Certiorari To the United States Court of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit properly held that ERISA does not preclude a non-participant's waiver, by marital settlement agreement, of an interest in the participant's pension plan benefits.

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STATEMENT OF THE CASE

As all parties agree that the facts are not in dispute, respondent Dessie Brown adopts the statement of facts contained in the decision of the Seventh Circuit Court of Appeals, En Banc, March 9, 1990, attached as appendix pages A-2 to A-4 of petitioner Laurine Brown's Petition For Writ of Certiorari.

REASONS FOR DENYING THE WRIT

INTRODUCTION

This is not an appropriate case for the exercise of this Court's certiorari jurisdiction. No conflict exists among the circuits, nor does the Seventh Circuit's opinion conflict with any applicable decisions of this Court. Although a case of first impression under ERISA, the Seventh Circuit correctly decided the issues presented below.

I. THE SEVENTH CIRCUIT CORRECTLY DECIDED THAT ERISA'S ANTI-ALIENATION PROVISIONS WERE NOT VIOLATED SINCE THE ACTUAL PLAN BENEFITS WERE PRESERVED

A focus of the Seventh Circuit's opinion, and petitioner's argument seeking review of same, is the ERISA provision prohibiting the alienation or assignment of plan benefits, 29 U.S.C. Sec. 1056(d)(1). As a bar to the unwise or ill-conceived transfer of benefits, ERISA contains this "spendthrift" provision, insulating benefits from actions which could compromise their availability to the plan participant. *AT&T v. Merry*, 592 F.2d 118 (2d Cir. 1979).

This prohibition against alienation or assignment guarantees that the participant's accrued benefits are available at the time of retirement. H.R. Rep. No. 807, 93d Cong. 2d Sess. 1974 reprinted in 1974 U.S. Cong. and Admin. News, 4670, 4734.

The Seventh Circuit properly found that ERISA's spendthrift provisions apply to a plan's participant, not to a waiver of the right to receive those benefits by a non-participant. Here, the decedent/participant made no disposition of his interest in the plan assets by entering into the subject marital settlement agreement. Indeed, the full amount of the participant's accrued benefit was preserved and remains available for distribution pending the conclusion of this appeal.

Petitioner asserts that the waiver contained in her marital settlement agreement does not meet the requirement of a qualified domestic relations order ("QDRO"), and was therefore ineffective and should be ignored. The requirement of a QDRO, a limited exception to ERISA's anti-alienation provisions, is incorporated in the ERISA amendments found in the Retirement Equity Act of 1984, Pub.L. No. 98-397, 98 Stat. 1433 (1984) (hereinafter "REA").

Assuming that the technical requirements of a QDRO are met, 29 U.S.C. Sec. 1056(d)(3)(B)-(E), a qualified domestic relations order recognizes the right of a spouse, former spouse, child or other alternate payee of a plan participant to receive plan benefits otherwise payable to the participant. A QDRO, therefore, is the proper method to preserve the interests of a former spouse in pension benefits.

Petitioner asserts that since the waiver incorporated in her marital settlement agreement is not a QDRO, it is preempted by ERISA's anti-alienation provisions. However, petitioner's argument misapprehends the purpose of a QDRO, which creates a means for non-participants to claim a right to plan benefits, and a method of protecting the interest of the non-participant in those benefits. See S.Rep. No. 575, 98th Cong., 2d Sess. 1984, reprinted in 1984 U.S. Code Cong. and Admin. News, 2547, 2565.

Petitioner's argument ignores the difference between a QDRO's assignment of a participant's interest in plan benefits and a non-participant's waiver of an interest in those benefits, which occurred here. Simply put, the QDRO creates a right to receive benefits, a proper waiver extinguishes any right. No right was created here. Instead, as the Seventh Circuit properly found, QDRO requirements do not apply where a non-participant specifically waived her interest in plan benefits.

Petitioner's argument also ignores other ERISA provisions allowing a non-participant to waive a beneficial interest in plan benefits. 29 U.S.C. Sec. 1055(c)(1)(A)(i) (spousal waiver of interest in joint and survivor form of benefit).

The Seventh Circuit correctly decided that petitioner's waiver of interest did not violate ERISA's anti-alienation provisions, and properly rejected her assertion that the waiver was void for failure to comply with the technical requirements of a QDRO.

II. THE SEVENTH CIRCUIT PROPERLY FASHIONED A FEDERAL COMMON LAW REMEDY TO GOVERN THIS ERISA DISPUTE

A. Where ERISA is Silent on an Issue, Federal Courts are Granted Authority to Determine a Federal Common Law Remedy

The Seventh Circuit recognized that the issue presented is a question of first impression under ERISA. Where, as here, ERISA is silent on the issue presented, federal courts are charged with the responsibility of fashioning a federal common law rule to govern the dispute. *Nachwalter v. Christie*, 805 F.2d 956, 959 (11th Cir. 1986). Congress fully anticipated and intended that federal courts would develop a body of common law to resolve disputes which could not be decided by a review of ERISA's text. *Franchise Tax Board of California v. Construction Laborer's Vacation Trust, et al.*, 103 S.Ct. 2841 (1982); *Amato v. Bernard*, 618 F.2d 559, 567 (9th Cir. 1980); H.R. Conf. Rep. No. 93-1280, p. 327 (1974).

Assuming that state law is consistent with the provisions of the federal statutes sought to be construed, analysis of state law can be a proper basis for determining the federal common law remedy. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985).

The district court analyzed Illinois law, finding that case law interpreting an ex-spouse's right to life insurance proceeds was properly analogous to the facts presented here. In Illinois (and, as the Seventh Circuit found, in "many states") a divorce decree bars an ex-spouse's right to receive life insurance proceeds if it includes a clear and specific waiver of that right. *O'Toole v. Central*

Laborers' Pension and Welfare Funds, 12 Ill.App. 3d 995, 299 N.E. 2d 392 (1973).

The district court, and the Seventh Circuit found that the waiver at issue met the requirements of clarity and specificity, and therefore enforced petitioner's renunciation of the benefit.

The district court performed its obligation in determining a well-grounded common law remedy where ERISA was silent on the issue presented, and was properly upheld by the Seventh Circuit.

B. The Seventh Circuit's Decision Promotes Uniform Application of ERISA

Contrary to petitioner's assertion, the Seventh Circuit's decision promotes uniformity and predictability in the application and enforcement of ERISA.

As here, when a statute is silent and provides no guidance on the issue presented, the stated goals of uniformity and predictability are achieved mainly through the creation of federal common law. Instead of undermining the statutory framework of ERISA, as suggested by petitioner, the district court's enunciation of common law principles adds to the decisional precedent critical to preserving the intent and application of the statute.

As found by the district court, the enforcement of petitioner's waiver remains entirely consistent with ERISA policy, insofar as upholding the waiver denying the benefit to petitioner supports the policy favoring the QDRO as the proper vehicle for preservation of an ex-spouse's interest in plan benefits.

Since the creation of federal common law here enhances ERISA's goals of uniformity and predictability, and the common law remedy is entirely consistent with ERISA policy, respondent respectfully requests that the petitioner's writ of certiorari be denied.

III. THE SEVENTH CIRCUIT'S DECISION CREATES NO NEW DUTIES OR OBLIGATIONS ON PENSION PLAN ADMINISTRATORS

Despite petitioner's claim, the Seventh Circuit clearly stated that it was imposing no new investigative duties or obligations on plan administrators. The court reiterated that pursuant to ERISA, plan administrators currently have an existing duty to review a participant's marital background before paying benefits.

This existent duty is not expanded by the Seventh Circuit ruling. Instead, the court held only that a waiver contained in a marital settlement agreement is effective if it becomes known to the plan administrator before payment of the benefit.

Petitioner's argument also ignores the fact that throughout the prior appeals, the Fund filed briefs agreeing that the district court's holding was a reasonable interpretation of the law, provided valuable guidance, and would not subject the plan administrator to additional burdensome obligations. To the contrary, the Fund contended that a failure to uphold the waiver would have resulted in greater difficulty for administrators.

As stated by the Seventh Circuit, "(T)he Fund in its brief concurs in the result we reach." As no new duties or obligations on plan administrators were imposed by the

Seventh Circuit's ruling, respondent respectfully requests that this Court deny petitioner's writ of certiorari.

CONCLUSION

For the foregoing reasons, respondent requests that petitioner's writ of certiorari be denied by this Court.

Respectfully submitted,

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